STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	**)**	
-vs-	**)**	
Illinois Bell Telephone Company	**)**	
	)	**03-0553**
Complaint concerning imposition of unreasonable	**)**	
And anti-competitive termination charges by	**)**	
Illinois Bell Telephone Company.	**)**	

MOTION TO STRIKE

Illinois Bell Telephone Company ("SBC Illinois" or the "Company"), by its attorney, hereby a Motion to Strike in the above-captioned proceeding.

1. TDS Metrocom, LLC ("TDS") Complaint in this proceeding was directed at SBC Illinois' termination liability policies. TDS Metrocom objected to SBC Illinois' practice of calculating such liabilities based on a percentage of the customer's remaining obligation under the contract when long-term service agreements are terminated prematurely. According to TDS Metrocom, these provisions made it difficult to compete and, therefore, were arbitrary, unreasonable and anti-competitive. To the extent relevant to this Motion, the relief requested by TDS Metrocom is as follows:

> b. To declare the termination charge provisions in the Customer A Services Contract, the Customer B Services Contract and the Customer A Centrex Contract, and all other contractual and tariff provisions of SBC Illinois that provide for the billing of charges (whether or not styled as "termination" charges) equal to all, or a substantial percentage of, the customer's remaining minimum annual revenue commitment and/or minimum annual subcommitments for the balance of the contract term (whether billed in a lump sum amount upon the customer terminating the contract as in the cases of Customers A and B, or on a piecemeal basis over the remainder of the contract term as in the case of Customer C), to be unjust, unreasonable, anticompetitive, and an impediment to the development of competition in the local service telecommunications markets, in violation of Sections 9-250 and 13-514 of the PUA, and therefore void and unlawful.
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> c. *To direct SBC Illinois to immediately replace all contract and tariff provisions of the types described in subparagraphs a and b above with termination*

charge provisions conforming to the directive in Finding (9) of the Commission's February 20, 2002 Order on Rehearing in the ASCENT case, Docket 00-0024.

> d. To the extent any agreements between SBC Illinois and customers containing termination charge provisions and minimum annual revenue commitment provisions of the types described in subparagraphs a and b above are agreements falling within the scope of Section 13-509 of the PUA (220 ILCS 5/13-509), to grant the relief requested in subparagraphs b and c above pursuant to the Commission's authority under Section 13-509.
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> e. Pursuant to Section 13-516(a)(2) of the PUA (220 ILCS 5/13-516(a)(2)), to impose financial penalties on SBC Illinois for the violations of Section 13-514 described herein.
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> f. Pursuant to Section 13-516(a)(3) of the PUA (220 ILCS 5/13-516(a)(3)), to award TDS Metrocom damages, as shall be determined in the course of this docket, plus attorney's fees and costs for prosecution of this Complaint, for SBC Illinois' violations of Section 13-514 described herein. Complaint at pp. 18-20 (¶ 40) (emphasis added).

Notably, TDS Metrocom's complaint refers only to *Finding (9)* of the *Ascent Order*, which addresses the *methodology* used to determine termination liabilities. TDS Metrocom subsequently circulated the direct testimony of Matthew Loch (TDS Metrocom Ex. 1.0) and Jennifer Stearns (TDS Metrocom Ex. 2.0). Like TDS Metrocom's complaint, its direct testimony addressed only the *level* of SBC Illinois' termination liabilities and their competitive impact on TDS Metrocom.

2. On April 2, 2004, TDS Metrocom circulated the rebuttal testimony of Matthew Loch (TDS Metrocom Ex. 1.5). In that testimony, TDS Metrocom for the first time referred to Finding (10) of the *Ascent Order* and raised the issue as to whether SBC Illinois should be required to calculate termination liabilities for customers taking service under long-term service agreements when requested to do so by a CLEC. TDS Metrocom's discussion of this issue is as follows:

> Q. Are there any other aspects of the ASCENT decision that are important to the issues in this case?

A. Yes. Finding (10) of the ASCENT order provided as follows:

> "[C]alculation of a termination charge, pursuant to the formula described in Finding (9), should be performed by Ameritech upon termination of service by the customer or upon oral or written request from a customer, whichever occurs first; when such calculation is requested by a customer, it should be performed, and the results communicated to the customer, within three business days; the customer should be permitted to designate a telecommunications services provider as an agent for the purpose of requesting and receiving such calculation; in the event of a dispute with respect to such calculation, the burden of proving the correctness of the calculation should lie with Ameritech."

Regardless of the form of termination penalty that the Commission orders in this case, or even if the Commission agrees with SBC and does not mandate any particular form of termination charge, it is important that SBC be required to continue to provide timely calculations of termination charges to customers and, with proper customer authorization, to other telecommunications carriers. A competitive local exchange carrier such as TDS Metrocom has absolutely no chance to compete with SBC Illinois for the business of a customer that SBC has signed to a long-term contract if we cannot obtain timely termination charge calculations from SBC. Again, TDS Metrocom is only requesting that SBC Illinois be required to provide termination charge calculations to competing suppliers if authorized to do so by the customer, as specified in Finding (10) of the ASCENT order. TDS Metrocom Ex. 1.5 (Loch Rebuttal) at 8-9.

3. To the extent that TDS Metrocom is asking the Commission to order the "continuation" of SBC Illinois' obligations under the *Ascent Order*, this proposal is unnecessary. The *Ascent Order* is still legally binding on SBC Illinois with respect to the services at issue in that proceeding (i.e., the ValueLink family of services).[1] SBC Illinois has not requested modification of Finding (9) in this proceeding to conform with its new termination liability policies, much less any of the other provisions of the *Ascent Order*. In fact, SBC Illinois made clear in its direct testimony that it will continue to comply with the *Ascent Order*, regardless of the outcome of this proceeding. SBC Ill. Ex. 1.0 (Gillespie Direct) at 12. To the extent that TDS

[1] SBC Illinois and Staff agree that the *Ascent Order* applies only to the ValueLink family of services that were the subject of the complaint in that proceeding. SBC Ill. Ex. 1.0 (Gillespie Direct) at 7-8; Staff Ex. 2.0 (Omoniyi Direct) at 11.

Metrocom is asking the Commission to require SBC Illinois to perform these calculations for CLECs for *all* products and services that are offered under long-term service agreements (rather than just the ValueLink family of services), it is improper. In that circumstance, TDS Metrocom is expanding the relief requested in this proceeding beyond the terms of its complaint and beyond its direct testimony.[2]

4. SBC Illinois hereby moves that Question and Answer 12 in the rebuttal testimony of Matthew Loch be stricken. TDS Metrocom Ex. 1.5 (Loch Rebuttal) at 8-9 (lines 171-197). It is axiomatic that the Commission may not grant relief which exceeds the scope of the relief requested in the complaint that is before it. *Alton and Southern Railroad et al. v. Illinois Commerce Commission ex rel. Perry Coal Company et al.,* 316 Ill. 625, 629-30 (1925) ("while the Commission should be notified of the complaint which they are required to answer, and although no particular form is prescribed, there must be a statement of the thing which is claimed to be wrong, sufficiently plain to put the carrier upon its defense"); *Peoples Gas, Light and Coke Company v. Illinois Commerce Commission*, 221 Ill.App.3d 1053, 1060 (1991) ("if the ICC were permitted to enter an order that is broader than the written complaint filed in the case then it would be ruling on an issue of which the responding party had no notice and no opportunity to defend or address"). As the *Peoples Gas, Light and Coke Company* case makes clear, this is not just a matter of procedural niceties. SBC Illinois had no notice that TDS Metrocom was going to raise the issue of calculating termination liabilities for CLECs and had no opportunity to defend against or address it in testimony. It would be violative of SBC Illinois' due process rights for the Commission to rule on TDS Metrocom's proposal under these circumstances.

[2] SBC Illinois provides such calculations today when requested to do so by its *customers*, and will continue to do so. SBC Illinois, however, does not believe that it has any obligation to provide these calculations to *CLECs*.

5. TDS Metrocom's proposal is also improper as rebuttal testimony. It is well-established that rebuttal evidence is that which ". . .answers, explains, repels, contradicts, or disproves evidence introduced. . ." by an opposing party. *Gabrenas v. R.D. Werner Co.*, 116 Ill.App.3d 276, 283 (1st Dist. 1983). Neither SBC Illinois nor Staff addressed this issue anywhere in their direct testimony. Therefore, TDS Metrocom was not answering, explaining, repelling, contradicting or disproving any evidence introduced by an opposing party when it raised this issue in its rebuttal testimony.

WHEREFORE, in view of the foregoing, the Motion to Strike of SBC Illinois should be granted.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

By:______________________________
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **MOTION TO STRIKE** was served on the following parties by U.S. Mail and/or electronic transmission on April 19, 2004.

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